

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 7553 of 2015

Date of decision : December 11, 2015

Punjab Health System Corporation through its M.D and another

..... Appellants

Versus

M/s Sharma and Associates and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Ms. Jasleen Kaur Chandhokk, Advocate
for the appellants.

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J (oral).

The appellant is aggrieved of impugned order passed by the Objecting court whereby the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside of the award dated 10.4.2013 has been dismissed.

Learned counsel for the appellants in support of her contentions has raised following points:-

- i) The arbitrator has not taken into consideration the terms and conditions of the contract. In essence, award is beyond the terms and conditions of the contract.
- ii) The arbitrator has awarded compensation to the tune of ₹11 lacs under claim No.5 and also entertained claim No.6 without there being any

evidence on record.

iii) There are three claims which have been assailed in the present appeal.

iv) The appellant had also filed counter claim before the arbitrator for refund of mobilization amount which has been ordered to be refunded but declined interest on the ground that the contract did not envisage any interest. She submits that the mobilization has been utilized by the contractor for a period of six years, therefore ought to have given some compensation in terms of interest.

v) In support of her contentions she has relied upon the two judgments, one of **Delhi High Court in National Thermal Power Corporation Ltd. Vs. Gammon India Ltd. and another 2008(3) ArbLR 94** and the other of Hon'ble Supreme Court in **Delhi Development Authority Vs. M/s R. S. Sharma & Co. New Delhi 2008 (4) RCR (Civil) 165** to contend that where the award is without adverting to the specific clause in the agreement the award is liable to be set aside.

I have heard learned counsel for the appellant and appraised the paper book.

The arbitrator while determining rates viz-a-viz excavation has taken into consideration schedule of rates (CSR) which contains item of soil containing a large quantity of boulders by

taking out the rate of soil at 188 per cum. The common Schedule of rates (CSR) contains an item of soil containing boulders and it works out as 188/cum for a depth of 8'6" instead of ₹50/- per cum allowed by the respondents. Similarly reasoning given for taking the rates reads thus:-

"The Claimant has also appended photographs of excavated soil duly stacked at site which shows that the soil contained a large quantity of boulders and obviously its rate cannot be covered under normal soil. Against the rate of Rs.50/- per cum allowed by the Respondents, the Claimant sought a rate of Rs.188/- per cum. According to the Claimant it had intimated the employer on 14/05/07 along with analysis of rate but it was neither rejected nor paid without any justification.

The Common Schedule of Rates (CSR) contains an item of soil containing boulders and it works out as Rs.188/cum for a depth of 8'6". No decision on this issue was ever taken by the Respondents though the Claimant had intimated its rate along with analysis of its rates. Site visit by bidders does not mean that they are to conduct soil analysis before tendering. The rates quoted were for BOQ Items as per description in the Detailed Notice Inviting Tender (DNIT) and no bidder could offer alternate description. Keeping in view the correspondence on the issue, cited judgment and photographs of the soil, is concluded that excavated earth contained boulders. The rate demanded has been derived from CSR. It is considered genuine and hence allowed. The cost of this item, therefore, works out Rs.389726/- (2073.01 cum @ Rs.188) against Rs.1,03,651 agreed by the employer and against Rs.4,68,035 demanded by the Claimant."

Viz-a-viz claim No.5 on account of delay and its consequences after discussing various points has given the following reasoning:-

Discussion and Conclusion

I have gone through the Claim and contention of both the parties. It has already been held under para-8 above, that the Contractual breaches were committed by the Respondents causing delays etc.

It has also been observed that after the third bill was paid to the Claimant on 07/09/07, there was hardly any correspondence from it to the Respondents for restart of the work.

It is also a fact that when the work comes to a standstill, overheads also get curtailed as one tends to keep a minimum basic staff. Further, the mobilization advance amounting to Rs.19.07 lakh and also a secured advance were still outstanding from the Claimant. Obviously, it would have machinery and equipment, shuttering and building materials etc., stored at site, requiring watch and ward etc.

The Hon'ble Apex Court has already held in AIR 1984 S.C.1703 — "M/s AT Brijpal Singh Vs. State of Gujarat" that breach of contract and the claim of damages on the basis of expected profit on the balance works depends on facts of each case.

In Punjab Government, such overheads and petty establishment used to be considered sufficient at 3% and provided in the estimates. Therefore, instead of relying on Hudson's formula in the instant case, the AT considers that allowing overhead expenses @ 3% of balance work should meet the ends of justice. Further, the Punjab CSR takes into account contractor's profit @ 10% only and not @ 15%. Thus computation of prime

cost has been changed from a factor of 100/115 to 100/110. Accordingly, the amount against this claim works out as under:-

<i>Stipulated cost of work</i>	<i>Rs.54788643.00 ... (i)</i>
<i>Prime cost (1x100/110)</i>	<i>Rs. 49807857.27</i>
<i>Work done (As per Claim No.1)</i>	<i>Rs.10628849.63</i>
<i>Balance work</i>	<i>Rs. 39179007.64(ii)</i>
<i>For overheads & Other expenses @ 3% of (ii):</i>	<i>Rs. 1175370.23</i>

I, therefore, award Rs.1175370.23 in favour of the Claimant and against the Respondents.”

Viz-a-viz other claims the arbitrator after noticing the contention of both the parties taking into consideration clause 60 which deals with payment upon termination gave following finding:-

“Actually this clause clearly lays onus on Respondents that while terminating the contract, it should also pay for cost incurred in removal of the equipment, repatriation of contractor's personnel employed solely on the work and contractor's cost of protecting and securing the work etc., which has not been done in this case.

The Hon'ble apex court considers such loss of profit upto 15% subject to leading on evidence and facts to be proved in a case.

It has been held on the basis of statement of claims as well as during arguments and various submissions, documents etc. that the work was stopped by the Respondents due to financial constraints and there were also other two fundamental breaches on their part.

It is true that no evidence by way of witnesses has been resorted to by the Claimant or for that matter, by the Respondents. As brought out in preceding paras, that the Claimant did suffer loss due to non-execution or denial of the balance work and has demanded such profit @ 15%

of balance work. The Claimant has also filed their Income Tax Statements which show that there was decline in their income during the corresponding period.

The Respondents could not prove fault on the part of the Claimant for delay or abandonment of work.

It is further felt that both the Claimant as well as the Respondents took one and a half year to decide to rescind/terminate the contract after stipulated date of completion. Therefore, under such circumstances, and also keeping in view the stature of the firm i.e.; a small enterprise, in the instance case 5% of the cost of balance work and not 15% should suffice as adequate compensation to the Claimant on account of denial of balance work. Thus, it works out as under:-

Balance work as worked out in Claim No.5 : Rs. 39179007.64

Damages @ 5% of (ii) Rs.1958950.38

I, therefore, award Rs.19,58,950.38 in favour of the Claimant & against the respondents.”

Learned counsel for the appellants, during the course of arguments has laid much emphasis that all these facts have not been noticed by the Objecting court, therefore, this is a fit case of remand.

The aforementioned plea of learned counsel for the appellant is not sustainable as the objecting court while dealing with the objections has given a detail reasoning which reads thus:-

“6. Coming to the facts in hand the only grievance of the petitioner is that the respondent did not start the work promptly and failed to execute it despite release of due payments from time to time but it has been conceded by the petitioner itself that during the course of work, in August 2007 shortage of funds was apprehended , consequently the contractor was asked to slow down

the pace of work. As per the respondent he was not only asked to slow down the pace of construction work but he was further warned not to go ahead with further material procurement as any material procured for construction purposes would be at his own risk and cost. It goes without saying that respondent might have undertaken the work with profit motive. By agreeing to construct a 50 bedded hospital, he was not to do charity. If he is being forewarned not to go ahead with the construction work on the premise that the corporation was short of funds, no sane person would go ahead with the construction work. Moreover it has not been denied by the petitioner that there was a delay in furnishing of drawings and piece meal availability of the site which contributed in delayed execution of the work. This court cannot reappraise the evidence led before arbitrator to arrive otherwise.

7. *As regarding the point raised to assail the award, it has been duly replied regarding claim No.1 that though some of the items were not listed in the contract but during the course of proceedings before Arbitrator, parties were ad-idem and consequently a sum of the before ₹1784749/- was arrived at by the arbitrator. Learned counsel for petitioner failed to pin point which rate was not agreed to between them.*

Similarly as regarding non-release of cash security, after the stipulated date i.e 14.8.2007, 50% of the amount became due while the remaining 50% was payable up to 13.1.2009.

As regarding use of bulk steel, no doubt the contractor was required to be more vigilant but when a contraction work at large scale is to be carried out, some differences in the weight of steel to be used may occur. Instead of granting a claim of 3.36%, arbitrator allowed 3% of the amount on account of extra weight of 16 mm

steel used in construction.

8. *Whenever on account of doings of the principal, some damage occurs to its agents, the agents become entitled to damages. In the instant case mere pleadings that due payments were being made is not sufficient to make out that the petitioners were flush with funds. Infact paucity of funds in the hands of petitioner was the main cause in non execution of the work. If on this account damages to the tune of ₹1175370/- has been allowed, no fault can be found in it.*

As regarding grant of ₹3,89,726/- pertaining to earth work in excavation, though it appears that Arbitrator allowed the costs beyond agreed rates and in this regard vehement reliance has been placed upon judgment of Hon'ble Supreme Court of India in Steel Authority of India Ltd. Vs J.C Budharaja, Government and Mining Contractor, (1998)8 SCC 122 Supreme Court wherein it has been held that award passed in disregard of express terms of the contract would be arbitrary and without jurisdiction but a careful perusal of award under challenge makes out that the arbitrator has justified this slight over-enthusiasm after noting down that the soil where excavation work was conducted had a large quantity of boulders and consequently normal rates of excavation were not justified. After taking recourse to Common Schedule of Rates (CSR), the claim was processed @ ₹188/cum on account of which against a sum of ₹103651/- agreed by the petitioner and against a claim of ₹468035/- a sum of ₹3,89,726/- was allowed which I do not find it illegal or arbitrary.

9. *Both the parties besides addressing oral arguments have also furnished written arguments which have been gone through minutely. No doubt civil court has power to set-aside award where there is an error*

*apparent on the face of record and when the award is contrary to the terms of the agreement as laid down by Hon'ble Apex Court in **Delhi Development Authority vs M/ S R.S Sharma and Co, New Delhi, 01 2008(4) R.C.R (Civil) 165** but the facts of the present case are clearly distinguishable."*

There is no dispute to the ratio decidendi culled out by the Hon'ble Supreme Court in **Delhi Development Authority's case (supra)** but the fact remains that terms and conditions of the contract have to be seen in each and every case. In the present case the award of the arbitrator is in consonance with the provisions of the contract as well as permissible rates for the reason that the contractor at many occasions had written a letter to the appellant for granting a particular rate and the appellant did not deny the same, therefore the arbitrator applied CSR rates.

The objections raised aforementioned does not fall within the parameters of Section 34 of the Arbitration and Conciliation Act, 1996.

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has now been raised in the aforementioned appeal has already been answered by the Hon'ble Supreme Court in catena of judgments wherein it has been laid down that until and unless the award suffers from illegality as statutorily prescribed under Section 31 (3) of the Act, the same cannot be interfered with. In this context I intend to refer the judgments of Hon'ble Supreme Court in **Associate**

Builders Vs. Delhi Development Authority (2015) 3 SCC 49 and
Navodaya Mass Entertainment Ltd. Vs.J. M. Combines (2015) 5

SCC 698. In the aforementioned judgment the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only in these circumstances it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embarked on a path by substitution in its own view. The Arbitrator has dealt with the dispute which was contemplated and was within the scope of it.

It is now a settled law that the Arbitrator is the sole judge of quality and quantity of the evidence before him and decide on the basis of the available evidence.

In my view, no error of law arise from the award. The award is perfect and justified and all the objections filed against the same were wholly misconceived.

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

(AMIT RAWAL)
JUDGE

December 11, 2015
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